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In the Supreme Court of the United States

OCTOBER TERM, 1986

THE ALUMINUM ASSOCIATION, INC., AND NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., PETITIONERS

v.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred in setting aside a 1983 Interstate Commerce Commission declaratory order authorizing shippers to seek reductions and refunds of rates for recyclable commodities on an individual rate basis.

1. Section 204(e) of the Staggers Rail Act of 1980, 49 U.S.C. 10731(e), required the nation's railroads to reduce within 90 days and thereafter to maintain freight rates for nonferrous recyclable commodities at revenue-to-variable cost ratio levels no higher than are necessary to maintain adequate railroad revenues and to preserve an economically sound transportation system.[1] In 1981, in the wake of the

[1] In *Ex Parte 394, Cost Ratio for Recyclables-1980 Determination*, 364 I.C.C. 425, 426 (1980), the Commission determined that the appropriate revenue-to-variable cost ratio was 146%. The Commission has revised this ratio from time to time.

court of appeals' decision in *National Ass'n of Recycling Industries, Inc.* v. *ICC* (*NARI III*), 660 F.2d 795 (D.C. Cir. 1981), the Commission both directed the railroads to adopt "territorial average rates" for recyclable commodities that would not exceed 146% of variable costs and instructed them to pay refunds for past overcharges based on those average rates. Pet. App. 5a-6a. The Commission had rejected as impractical the use of an individual rate reduction methodology (*i.e.*, reduction of each rate that was above the 146% ratio) to bring the rail industry into initial compliance with Section 204(e), but stated that "should a shipper of nonferrous recyclables believe that his particular rate still exceeds the permissible level, he may file a complaint with the Commission" (Pet. App. 7a).

The railroads complied with the Commission's 1981 decision by making rate reductions and by paying refunds pursuant to the territorial average rate reduction method. However, several shippers subsequently demanded that the railroads reduce certain individual rates which were still above the 146% ratio and pay them appropriate refunds. The railroads petitioned the Commission for an order clarifying their obligations under Section 204(e). In their petition, the railroads claimed that individual rate reductions could not be imposed where average rate reductions had been made and that requiring individual refunds, in addition to the territorial average refunds already paid, would force them to pay refunds twice. But the Commission rejected the railroads' arguments, holding that the "purpose of the averaging approach was simply to establish initial overall compliance. From the start, we contemplated individual adjustments in both directions that would maintain the overall level of compliance and in fact result in individual rates gravitating closer and closer to the 146-percent level" (Pet. App. 44a). The Commission therefore again

ruled that it would entertain complaint cases against individual rates that remained above the 146% level (Pet. App. 8a, 44a).

2. Upon the railroads' petition for review, the Court of Appeals for the District of Columbia Circuit reversed (Pet. App. 1a-24a). First, the court rejected the Commission's procedural argument that the individual rate question had been resolved in 1981 and that the 60-day time limit in the Hobbs Act, 28 U.S.C. 2344, therefore barred the railroads' present challenge (Pet. App. 9a-12a). The court stated that "in 1981 the Commission did not decide the question now presented" (Pet. App. 10a) and, accordingly, the present petition, which was filed within 60 days of the Commission's 1983 decision, was timely (Pet. App. 10a-11a). Next, the court held that the Commission's decision to entertain individual complaints, after requiring the railroads to reduce their rates (and pay refunds) pursuant to the territorial average rate reduction method, was contrary to the terms of Section 204(e), as construed in *NARI III* (Pet. App. 12a-17a). The court read Section 204(e), as construed in *NARI III*, to require only that the railroads immediately reduce their rates to a territorial average equal to or less than the 146% ratio; in the court's view, the statute allows the railroads to maintain individual rates above that average (although not to raise any individual rate that already equalled or exceeded that ratio) (Pet. App. 12a-15a). The court found the Commission's contrary reading to be statutorily unreasonable, concluding both that Congress had not intended the Commission to break with its past practice of requiring only average rate reductions and that the Commission's new interpretation would unfairly force the railroads to pay at least some double refunds (Pet. App. 15a-17a).

3. Petitioners claim that the court of appeals erred in two respects. First, they argue that the statute allows the Commission to entertain individual rate complaints against railroads that have made rate reductions pursuant to the territorial average rate method. Pet. 8-12. Second, they argue that, by allowing the railroads to obtain review of a matter that the Commission resolved in 1981, the court of appeals has frustrated the time limitations that the Hobbs Act imposes on parties seeking judicial review of ICC orders (Pet. 13-17). The federal respondents agree with petitioners' contentions, but believe that the significance of the court of appeals' decision is limited and this Court's review is not warranted.

a. The federal respondents share petitioners' view that the court of appeals misinterpreted Section 204(e) of the Staggers Act. Section 204(e), which is set forth at Pet. App. 4a-5a, is best understood as requiring the railroads to make both territorial average and individual rate reductions. The language of Section 204(e) does not support the court of appeals' conclusion that Congress intended that railroads would be required only to reduce their recyclables rates on the average. To the contrary, Section 204(e) states that the railroads "shall take all action necessary to reduce and thereafter maintain rates * * * at revenue-to-variable cost ratio levels that are equal to or less than" the specified level. Absent statutory language or legislative history to the contrary, the Commission has reasonably concluded that Congress did not intend to have some recyclables shippers paying rates below the statutory maximum while other, possibly competing, shippers are paying rates that are substantially higher.

However, the federal respondents did not seek certiorari and do not believe that this issue is significant enough to warrant this Court's review. The statutory provision involved in this case applies only to shipments of recyclable commodities by rail. The federal respondents are not aware of

any comparable statutory provision applicable to any other industry or administrative agency. Thus, the court of appeals' decision will have no effect beyond its effect on the parties to this litigation.

b. The federal respondents also agree with petitioners that the court of appeals erred in ruling that the railroads' petition was timely under the Hobbs Act. The Commission believes, contrary to the court of appeals' view (Pet. App. 9a-11a), that it in fact resolved in 1981 that shippers could complain that their individual rates were excessive. See Pet. App. 101a. The Commission necessarily resolved that question in 1981 in deciding how the railroads could bring their rates into compliance with the statutory rate ceiling. Accordingly, the Hobbs Act should have been held to bar the railroads' attempt to obtain judicial review of this issue in 1983.

However, we do not believe that this issue warrants this Court's review. The court of appeals acknowledged that the Hobbs Act establishes a 60-day time limit for seeking judicial review of ICC orders. The court found that the question whether individual complaints could be filed had not been decided in 1981 and, accordingly, that the Hobbs Act did not foreclose judicial review in 1983. Pet. App. 9a-11a. The court of appeals' decision was thus based on its view of the history of these proceedings and not on any ruling of broader significance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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